FOR ARGUMENT

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-17

UNITED GAS PIPE LINE COMPANY,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

No. 78-249

FEDERAL ENERGY REGULATORY COMMISSION,
Petitioner,

v.

BILLY J. McCOMBS, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONER UNITED GAS PIPE LINE COMPANY

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The court below held that a lawful abandonment of a producer's certificated service obligation under Section 7(b) of the Natural Gas Act was effected by the fact that gas production ceased from the reserves known to exist on the dedicated acreage. Ignoring the *de facto* abandonment rationale adopted by the court below, the

respondents, the McCombs Group, argue that the holding of the court below should be sustained as an abandonment retroactively authorized. Alternatively, the McCombs Group argues that the certificate obligation did not extend to the newly discovered reserves involved here because production from such reserves was not part of the service originally rendered. The decision below cannot be sustained on either ground.

1. For the reasons stated in Argument IV of United's opening brief (pp. 25-29), retroactive abandonment (or *nunc pro tunc* abandonment) is unwarranted here. The two additional cases cited by the McCombs Group in its brief on the merits add nothing to those previously cited in its opposition to certiorari. The first, *Borough of Ellwood City* v. *FERC*,[1] is a case like *Highland Resources, Inc.* v. *FPC*,[2] where the Commission excused a past failure to file to prevent the prejudice that a regulated firm would otherwise have incurred because it had acted upon an agency interpretation of filing requirements later determined to be incorrect by the courts. For the reasons stated in United's opening brief (pp. 28-29), the principle of these cases is inapplicable here because the producers did not act in accordance with any existing Commission regulations but, on the contrary, ignored two letters from the Secretary of the Commission informing them that an abandonment filing was required. (Pet. App. 97-98, 100.)

The second case cited by the McCombs Group, *Arkansas Louisiana Gas Company*,[3] has no bearing on the

[1] 583 F.2d 642 (3d Cir. 1978), petition for cert. filed, No. 78-945.

[2] 537 F.2d 1336 (5th Cir. 1976).

[3] Docket No. CP76-329, —— FPC —— (1977).

issues here. That Commission order involved a certificate for Arkansas Louisiana Gas Company ("Arkla") to sell gas to another pipeline when and if Arkla had such gas available, *i.e.*, there was never any obligation to sell any particular quantity of gas. Arkla's supply had diminished to the point where it had not sold any gas under the certificate for a long period of time. Although recognizing that Arkla's service under the certificate had long since ceased, the Commission's order granting abandonment had prospective application only and was based on the facts as they existed at the time abandonment was permitted. In contrast, the abandonment sought by the McCombs Group here would have retroactive application and would be based on factual assumptions now known to be incorrect.

Not only do the cases cited by the McCombs Group fail to support its argument for retroactive abandonment, but also the record in this case lacks support for the factual predicate upon which that argument is based. The McCombs Group contends that the Commission should be required to authorize abandonment retroactively based on the assertions that McCombs' predecessor in interest acted in "good faith" in failing to file for abandonment between 1966 and 1971 and that McCombs was "totally innocent" in failing to perceive that the new production from the Butler B lease was committed to United. (Br. 8-9, 13-20.) The Commission, however, made no findings on either of these contentions. Indeed, there is substantial evidence in the record that contradicts the assertions upon which the McCombs Group relies. For example:

a. The record does not show any adequate basis for the assumption by the McCombs Group's predecessor, Louis Haring, that the contract with United ceased to be effective. Haring admitted that this

assumption was not based on communications with United; indeed, he stated that he never discussed the matter with anyone at United. (R. 209.) In contrast, the communications from United to Haring demonstrate that United viewed the contract as remaining in effect. When production ceased in 1966, United's letter to the operators informing them of the removal of its field measuring system clearly contemplated the possibility of future deliveries that would be subject to the 1953 contract. (Ex. 4; R. 47-48, 55, 404; Ex. 31; R. 242, 578-79.) Moreover, by letter dated June 23, 1969, United offered to set a new price under the contract, an action plainly at odds with any assumption by the producer that the contract with United was no longer in effect. (Ex. 5; R. 55, 405.) And significantly, the producers never made any response to United indicating that their view of their obligation under the 1953 contract was different from United's.

b. The record does not show adequate reasons why Haring felt it was unnecessary to file for abandonment after production from the lease ceased in 1966. In his testimony, Haring stated that his belief on this point was based on discussions with one of his co-owners who was a lawyer. (R. 208-09, 211-12.) He did not state the basis for the co-owner's point of view. The McCombs Group attempts (Br. 18-19) to justify Haring's position on the basis of "existing judicial statements" on abandonment by certain Circuit Courts of Appeal.[4] Citation of this authority, however, carries no weight, since decisions by this Court had made it clear that Commission approval based on a hearing and statutory finding was necessary in order for

[4] Hunt v. FPC, 306 F.2d 334, 342 (5th Cir. 1962); Harper Oil Co. v. FPC, 284 F.2d 137, 139 (10th Cir. 1960).

an abandonment to be effected.[5] Moreover, on two separate occasions the producers involved here received letters from the Secretary of the Commission expressly advising them that if no further sales were contemplated, it would be necessary to file applications with the Commission to abandon service. (Pet. App. 97-98, 100.) Notwithstanding these letters, the producers never sought Commission approval for abandonment.

c. The record is by no means clear that the McCombs Group was "totally innocent" in failing to recognize that the new production from the Butler B lease was committed to United. After the McCombs Group received a title opinion disclosing United's contract covering the Butler B lease, the Group's negotiator, Bill Forney, continued to deal with United as if the McCombs Group had an unencumbered right to market the gas. His explanation was that Louis Haring had told him that there was a letter in Haring's files evidencing United's release of its contract rights. (R. 257.) However, Haring testified that he never told Forney of any such document. Indeed, Haring testified that the alleged conversation with Forney never took place. (R. 223.) In any event, the McCombs Group concedes that there never was any such letter. (Br. 7-8.)

d. Finally, there is conflicting evidence in the record as to whether Forney responded to United's inquiry about the source of the McCombs Group's right to the gas. The witness for United asserted that Forney represented that the leases were unencumbered and that United relied upon this assertion. (R. 89-90.)

[5] United Gas Pipe Line Co. v. FPC, 385 U.S. 83, 89 (1966); Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 156, 158 n.25 (1960).

Thus, the record is by no means clear on the "good faith" allegations upon which the McCombs Group relies in arguing for retroactive abandonment. More important, the Commission made no finding on either Haring's good faith or on the McCombs Group's total innocence. Even on the McCombs Group's theory, a finding by the Commission of good faith failure to file would be necessary to support a retroactive abandonment order. Since it is for the Commission and not the courts to resolve disputed issues of fact,[6] the retroactive abandonment argument of the McCombs Group provides no basis for sustaining the decision of the court below.

2. The McCombs Group's contention that a distinction exists between the service certificated under Section 7(c) of the Natural Gas Act and the service which is subject to the abandonment requirement of Section 7(b) is based on a construction of the Act which is clearly incorrect and at odds with its purposes. The interrelation between these two sections was described by this Court in *Sunray Mid-Continent Oil Company* v. *FPC:*

> An initial application of an independent producer, to make movements of natural gas in interstate commerce, leads to a certificate of public convenience and necessity under which the Commission controls the basis on which 'gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval . . . .'[7]

[6] FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326, 331-34 (1976); SEC v. Chenery Corp., 318 U.S. 80, 87-88 (1943).

[7] 364 U.S. 137, 156 (1960), *quoting,* Atlantic Ref. Co. v. Public Serv. Comm'n of New York, 360 U.S. 378, 389 (1959).

This discussion makes clear that the supply "so dedicated" under Section 7(c) is identical to "that supply" for which Section 7(b) abandonment authorization must be sought.

The assertions of the McCombs Group notwithstanding, it is well established that the certificate and the contract upon which the certificate is based define the service that is subject to the abandonment requirement of Section 7(b).[8] Applying this principle, the Fifth Circuit in *Mitchell Energy Corp.* v. *FPC*[9] held that reserves not known to exist at the time of the original certificate were nevertheless subject to the producer's service obligation and the abandonment requirements of Section 7(b). As in *Mitchell Energy,* there is no depth limitation in the lease or in the contract here. Indeed, the contract expressly covers "merchantable natural gas . . . produced from all wells now or hereafter drilled during the term of this contract on the lands and leasholds" subject to the contract. (R. 45-46, 365.) Thus, as in *Mitchell Energy,* the deeper reserves are dedicated as well as the shallow reserves that were producing when the certificate was granted.

The McCombs Group's argument is that the producer's obligation to supply gas in interstate commerce is limited to that service within the certificate that the producer chooses to undertake. On this theory, the producer's obligation to interstate commerce is determined to a large extent by the producer, *i.e.,* "service rendered" includes no more than the producer's "actual

[8] Murphy Oil Corp. v. FERC, No. 77-1720 (8th Cir., Dec. 28, 1978); Harrison v. FERC, 567 F.2d 308 (5th Cir. 1978); Phillips Petroleum Corp. v. FPC, 556 F.2d 446 (10th Cir. 1977); Vreeland v. FPC, 528 F.2d 1343 (5th Cir. 1976).

[9] 533 F.2d 258 (5th Cir. 1976).

deliveries of gas in interstate commerce." (McCombs Group Br. 29.) This is clearly at odds with the Natural Gas Act's purpose of ensuring that the Commission may "control both the terms on which a service is provided to the interstate market and the conditions on which it will cease." [10]

CONCLUSION

For the foregoing reasons, and the reasons stated in United's opening brief, the judgment of the court below should be reversed.

Respectfully submitted,

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[10] California v. Southland Royalty Co., 436 U.S. 519, 524 (1978).